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10/572,719	03/21/2006	Ronald Vermeer	CS-8755/BCS033048	4678

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EXAMINER
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FISHER, ABIGAIL L

ART UNIT	PAPER NUMBER
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1616

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08/04/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/572,719	<b>Applicant(s)</b> VERMEER, RONALD	
	<b>Examiner</b> ABIGAIL FISHER	<b>Art Unit</b> 1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on 23 April 2008.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 11-18 and 21-24 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☐ Claim(s) 11-18 and 21-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

Receipt of Amendments/Remarks filed on April 23 2008 is acknowledged.  
Claims 1-10 and 19-20 were/stand cancelled. Claim 11 was amended. Claims 21-24 were added. Claims 11-18 and 21-24 are pending.

### ***Information Disclosure Statement***

Applicant indicates that the Information Disclosure Statement (Form PTO 1449) did not contain the examiner's initials for each document. The examiner would like to point out that the bottom of the 1449 contains the statement that "all references considered except where lined through." Therefore, unless the particular reference contains a line through the row, the reference was considered by the examiner. This stamp at the bottom of the 1449 is something new and therefore the applicant was most likely not aware that the PTO was now utilizing this stamp instead of requiring the examiner to initial every submitted item.

### ***Election/Restrictions***

Applicant's election without traverse of Group I, claims 11-18 in the reply filed on April 23 2008 is acknowledged. Claims 11-18 and 21-24 are pending in the application. Claims 19-20 were withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim but have subsequently been canceled by the applicant. Accordingly, claims 11-18 and 21-24 are being examined on the merits herein.

### ***Specification***

The amendment of the specification to capitalize all trademark names as well as accompany the name by the generic terminology is acknowledged.

**Note: MPEP 608.01(v)**

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

The rejection of claims 11-12 and 18 under 35 U.S.C. 102(b) as being anticipated by Schlatter (US PG PUB No. 2002/0040044) is **withdrawn** in light of Applicant's amendments filed on April 23 2008 to specifically claim alkanolethoxylates of formula (I).

### ***Response to Arguments***

Applicant's arguments with respect to claims 11-12 and 18 have been considered but are moot in view of the new ground(s) of rejection.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

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the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Applicant Claims
2. Determining the scope and contents of the prior art.
3. Ascertaining the differences between the prior art and the claims at issue, and resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

The rejection of claims 11, 13-15, and 17-18 under 35 U.S.C. 103(a) as being unpatentable over Schlatter is **withdrawn** in light of Applicant's amendments filed on April 23 2008 to specifically claim alkanolethoxylates of formula (I).

The rejection of claims 11 and 16 under 35 U.S.C. 103(a) as being unpatentable over Schlatter in view of Kunz et al. (WO 02/081437) is **withdrawn** in light of Applicant's amendments filed on April 23 2008 to specifically claim alkanolethoxylates of formula (I).

**Claims 11-15, 17-18 and 21-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schlatter (2004/0127739, cited in the Office action mailed on 12/19/07) in view of Baur (J. Agric. Food Chem., 1999).**

#### ***Applicant Claims***

Applicant claims a suspension concentrate comprising at least one active compound that is solid at room temperature, at least one alkanolethoxylate of formula I,

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at least one dispersant, water, and optionally one or more additives. A further limitation is that the suspension can comprise two dispersants. The dispersants are selected from the group consisting of the polymers of methyl 2-methyl-2-propenoate and  $\alpha$ -(2-methyl-1-oxo-2-propenyl)- $\omega$ -methoxy-poly(oxy-1,2-ethanediyl), tristyrylphenoethoxylates, and propylene oxide/ethylene oxide block copolymers having molecular weights between 8000 and 10,000.

Specific active compounds claimed are tebuconazole or tebuconazole and trifloxystrobin or prothioconazole and fluoxastrobin or trifloxystrobin.

***Determination of the Scope and Content of the Prior Art (MPEP §2141.01)***

Schlatter is directed pesticidal composition in the form of aqueous suspension concentrates. The concentrates comprise a triazole fungicide and surfactants. The surfactants that are included are tristyrylphenol-ethoxylates and ethylene oxide-propylene oxide block polymers. The tristyrylphenol-ethoxylates typically have 8 to 40 mol ethoxylate (paragraph 0012 and 0013). The ethylene oxide-propylene oxide block polymers have an average molecular weight of 1,000-30,000 and a weight ratio of EO:PO of at least 50% (paragraph 0020 and 0021). One preferred combination is a combination of tristyrylphenol-ethoxylates and block-polymer of ethylene oxide-propylene oxide (paragraph 0026). The composition comprises fungicides. Those fungicides listed as being suitable includes tebuconazole (paragraph 0028), trifloxystrobin, azoxystrobin (paragraph 0030). Also mixtures of the fungicides are listed as being acceptable (paragraph 0032). Also included in the composition are dispersing agents, one exemplified is Atlox 4913, which is polymers of methyl 2-methyl-2-propenoate and

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$\alpha$ -(2-methyl-1-oxo-2-propenyl)-  $\omega$ -methoxy-poly(oxy-1,2-ethanediyl). Other ingredients that may be added include thickening agents, antifreeze agents, defoaming agents, preservatives, buffer, and adjuvants (paragraphs 0039-0045). It is taught that adjuvants that raise the biological availability and efficacy can be included. These types of compounds include alcohol ethoxylates (paragraph 0045).

***Ascertainment of the Difference Between Scope the Prior Art and the Claims***

***(MPEP §2141.012)***

Schlatter does not exemplify tebuconazole, trifloxystrobin, azoxystrobin, or the combination of tebuconazole and trifloxystrobin. Schlatter does not exemplify the triserylphenoethoxylate is not a salt. Schlatter does not exemplify utilizing a propylene oxide/ethylene oxide block copolymer having a molecular weight between 8000 and 10000 and an ethylene oxide proportion between 40 and 60%. Schlatter does not exemplify a formulation comprising Atlox 4913 and a propylene oxide/ethylene oxide block copolymer having a molecular weight between 8000 and 10000 and an ethylene oxide proportion between 40 and 60%. Schlatter does not specify types of alcohol ethoxylates that can be utilized. However, these deficiencies are cured by Baur.

Baur teach that efficient use of crop protection agents requires a rapid uptake of the active ingredient into the plant (page 753, 1<sup>st</sup> paragraph). Adjuvants are known to increase rates of foliar penetration and surfactants are probably the adjuvant that has been studied the most (page 753, 2nd paragraph). Genapol C-100 was found to be superior under most conditions and never failed to increase penetration (abstract). Genapol C-100 with an intermediate degree of ethoxylation was found to be the most

suitable for a wide range of humidity and temperature conditions (page 760, conclusions, second paragraph).

***Finding of Prima Facie Obviousness Rational and Motivation  
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art to combine the teachings of Schlatter and Baur and utilize Genapol C 100 as the adjuvant. One of ordinary skill in the art would have been motivated to utilize Genapol C 100 as the adjuvant because Schlatter teaches that alcohol ethoxylates can be utilized to enhance biological availability and efficacy. Baur teaches that Genapol C 100 was found to be superior under most conditions at increasing the penetration of the active into the plant. Therefore one of ordinary skill in the art would have had a reasonable expectation of success in incorporating Genapol C 100 into the pesticidal suspension concentrates of Schlatter.

While Schlatter does not exemplify the non-salt variety of trisarylphenoethoxylate, the non salt variety is clearly contemplated. The formula listed in paragraph 0012 is clearly of the alcohol. Therefore it would have been obvious to one of ordinary skill in the art to use the non-salt variety of trisarylphenoethoxylate as it is listed as a suitable surfactant to be used in the concentrate. It would have been obvious to one of ordinary skill in the art to pursue known options within his or her technical grasp, those surfactants listed as being suitable.

It would have been obvious to one of ordinary skill in the art to combine the teachings of Schlatter and Baur and utilize at least two surfactants/dispersing agents in



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combination. One of ordinary skill in the art would have been motivated to utilize a combination of surfactants because Schlatter specifically teaches that combinations of surfactants are preferred. It would have been obvious to one of ordinary skill in the art to optimize the types of surfactant/dispersing agents utilized from those listed by Schlatter as being suitable for incorporation into the suspension concentrates.

Regarding the claimed number of oxyethylene units of the tristyrylphenoethoxylate, Schlatter teaches that the average values are from 8-40 mol. In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5]**

Regarding the claimed molecular weight of the propylene oxide/ethylene oxide block copolymer and the amount of ethylene oxide proportion, Schlatter teaches that the molecular weight is from 1000-30000 and the weight ratio of EO:PO is at least 50%. In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5]**

It would have been obvious to one of ordinary skill in the art to use different fungicides that are taught in the art as being suitable for pesticides to formulate a pesticidal composition. As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06.**

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

### ***Response to Arguments***

Applicant argues that Schlatter teaches tristyrylphenol ethoxylates have an average ethoxylate content of 8 to 40 mol but with a distinct preference for 10 to 20 or 14 to 18 mol. However, Applicant's invention has a preference for 29 to 60 oxyethylene units.

Applicant's arguments filed April 23 2008 have been fully considered but they are not persuasive.

The rejection of claims 11-15, 17-18 and 21-24 is made under 103 and does not need to exemplify all embodiments, only suggest. "Disclosed examples and preferred embodiments do not constitute a teaching away from the broader disclosure or non-preferred embodiment." *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). Therefore, while Schlatter does indicate a preference for lower mol percentages of ethoxylate, it is prior art for all that it teaches namely the mol percentage of 8 to 40.

The declaration under 37 CFR 1.132 filed April 23 2008 is insufficient to overcome the rejection of claims 11-15, 17-18 and 21-24 based upon Schlatter in view of Baur. The examiner acknowledges the declaration. However, considering the new grounds of rejection necessitated by the amendment filed on April 23 2008, this

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declaration is insufficient to overcome the newly cited art. While the declaration shows the improved penetration when compared to Atlox 4894, this is not a true side by side comparison of the closest prior art of record. Applicant's evidence demonstrates the criticality of Genapol C 100, which is taught by Baur, however does not show the comparison of the unexpected properties when Genapol C 100 is incorporated into the invention of Schlatter.

**Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Schlatter in view of Baur and in further view of Kunz et al. (WO 02/081437, cited in the Office action mailed on 12/19/07).**

***Applicant Claims***

Applicant claims a suspension concentrate comprising at least one active compound that is solid at room temperature, at least one alkanolethoxylate, at least one dispersant, water, and optionally one or more additives. The active compounds are prothioconazole and fluoxastrobin.

***Determination of the Scope and Content of the Prior Art (MPEP §2141.01)***

The teachings of Schlatter Baur are set forth above. Specifically Schlatter is directed to suspension concentrates comprising fungicides, surfactants, dispersing agents, and water. Baur teaches that Genapol C 100 is a superior penetration enhancer to use in crop protection.

***Ascertainment of the Difference Between Scope the Prior Art and the Claims  
(MPEP §2141.012)***

Schlatter does not specify that the fungicides can be fluoxastrobin or prothioconazole. However, this deficiency is cured by Kunz et al.

Kunz et al. is directed to compounds that possess useful plant protecting properties and may be employed in agricultural practice (abstract). Fungicides that are listed include HEC 5725 (proposed common name fluoxastrobin, and JAU 6476 (proposed common name prothioconazole) (page 24, lines 17 and 29).

***Finding of Prima Facie Obviousness Rational and Motivation  
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art to combine the teachings of Schlatter, Baur, and Kunz et al. and utilize fluoxastrobin and prothioconazole in the invention of Schlatter. Fluoxastrobin and prothioconazole are known fungicides and therefore it would have been obvious to use them in a pesticidal composition.

As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

### ***Response to Arguments***

Applicant argues that the N-phenethyl thioacetate acid derivatives are not among the types of active compounds specified by Applicants. Applicant argues that the teachings of Kunz et al. are simply too diffuse to lead those skilled in the art to their claimed invention. There is no teaching in Kunz et al. to one of ordinary skill in the art to select the components required by Applicants while ignoring the clear teaching of Kunz et al. that the N-phenethyl thioacetic acid derivatives must be present as a necessary component.

Applicant's arguments filed April 23 2008 have been fully considered but they are not persuasive.

Firstly, the examiner would like to note that the instant claim language contains the transitional phrase comprising, therefore, if one of ordinary skill desired to incorporate the N-phenethyl thioacetic acid derivatives taught by Kunz et al. along with the other disclosed fungicides into the invention of Schlatter this would still render the instant invention obvious over the prior art. Secondly, the examiner utilized the Kunz et al. references to demonstrate other fungicides that are utilized for the same purpose as those of Schlatter. Some of the fungicides listed in paragraph 0164 of Kunz et al. are the same as those of Schlatter such as tebuconazole, azoxystrobin, pefurazolate, imazlil, etc. Therefore, it would have been obvious to one of ordinary skill in the art to utilize fluoxastrobin and priothioconazole as they are both taught in by Kunz et al. as fungicides, which is exactly what the active compounds of Schlatter are. Furthermore, Kunz et al. clearly teaches that fluoxastrobin and priothioconazole are functional

equivalents of tebuconazole, azoxystrobin, etc. Therefore, replacement of one for another would have been obvious to one of ordinary skill in the art and one would have had a reasonable expectation of success.

### ***Conclusion***

No claims are allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ABIGAIL FISHER whose telephone number is (571)270-3502. The examiner can normally be reached on M-Th 9am-6pm EST.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Abigail Fisher  
Examiner  
Art Unit 1616

AF

/Mina Haghighatian/  
Primary Examiner, Art Unit 1616

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